Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1614

WILBERT LEE BALLARD,
Appellant,

v.

BOARD OF TRUSTEES OF THE POLICE PENSION FUND
OF THE CITY OF EVANSVILLE, INDIANA,
Appellee.

On Appeal from the Supreme Court of Indiana

JURISDICTIONAL STATEMENT

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INDEX

	Page
Jurisdictional Statement	1
Opinion Below	2
Jurisdiction	2
Statutes Involved	2
Questions Presented	3
Statement	3
The Questions Are Substantial	6
Appendix A—Opinion and Judgment of the Indiana Supreme Court	A-1
Appendix B—Opinion and Judgment of the Indiana Court of Appeals	A-9
Appendix C—Notice of Appeal	A-19

CITATIONS

Cases

Avery v. Everett, 110 N.Y. 317, 18 N.E. 14 (1888)	A-7
Ballard v. Board of Trustees of Police Pension Fund of City of Evansville, — Ind. —, 313 N.E. 2d 351 (1974)	2, A-3
Carr v. State, 175 Ind. 241, 93 N.E. 1071 (1911)	A-6
Center v. Commercial Bank of Crown Point, 209 Ind. 510, 199 N.E. 567 (1936)	A-6

Commonwealth v. Avery, 77 Ky. 625, 29 A.R. 429 (1879) A-8
Cummins v. Missouri, 71 U.S. (4 Wall.) 277 (1867) 2, 6, 7

Dent v. Virginia, 129 U.S. 114 (1889) 2, 7
DeVeau v. Braisted, 363 U.S. 144 (1960) 7

Ex Parte Garland, 71 U.S. (4 Wall.) 333 (1867) 2, 7

Flemming v. Nestor, 363 U.S. 603 (1960) 6, 7, 8

Jensen v. Pritchard, 120 Ind. App. 439, 90 N.E. 2d 518 (1950) A-4, A-13, A-17

Kern v. State ex rel. Bess, 212 Ind. 611, 126 N.E. 2d 487 (1937) A-4, A-13
Klamm v. State ex rel. Carlson, 235 Ind. 289, 126 N.E. 2d 487 (1955) A-4, A-5, A-13, A-14, A-17

Leonard v. City of Seattle, 81 Wash. 2d 479, 503 P. 2d 741 (1972) A-15, A-17

Martin v. Ben Davis Concervancy Dist., 238 Ind. 502, 153 N.E. 2d 125 (1958) A-6

Pennie v. Reis, 132 U.S. 464 (1889) A-13

Raines v. Board of Trustees Pen. Fund, 365 Ill. 610, 7 N.E. 2d 489 (1937) A-13

Salley v. Firemen's and Policemen's Pension Fund Commission, 124 N.J.L. 79, 11 A.2d 244 (1940) A-17
State ex rel. v. Trustees, 149 Ohio St. 477, 79 N.E. 2d 316 (1948) A-14

Trop v. Dulles, 356 U.S. 86 (1958) 8

United States v. Brown, 381 U.S. 437 (1965) 5, 6
United States v. O'Brien, 391 U.S. 367 (1968) 6

Miscellaneous

Acts of the Indiana General Assembly of 1925, Chapter 51, § 5, p. 167, I.C. 1971, 19-1-24-5 (Ind. Ann. Stat. § 48-6405) 2, 3, 6, 8, 9, A-3, A-7, A-10

10 A.L.R. 1591 (1921) A-7

16 Am. Jur. 2d Consti. Law § 411 (1964) A-7

Black's Law Dictionary (4th Ed. 1951) A-8

1 Chit. Criminal Law 723 (1841) A-7

Constitution of the United States, Article 1, § 10 (1) 5, 6

Constitution of the State of Indiana, Article 1, § 30 .....A-1, A-7, A-15

I.C. 1971 19-1-24-2 (Ind. Ann. Stat. § 48-6402) (1974 Supp.) A-4, A-12

I.C. 1971 19-1-24-2 (Ind. Ann. Stat. § 48-6404) 1974 Supp. A-6

F. Maitland, The Forms of Action at Ancient Common Law (1936) A-8

4 Wendell's Blackstone's Commentaries 380 (1852) A-7

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BOARD OF TRUSTEES OF THE POLICE PENSION FUND
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Appellee.

On Appeal from the Supreme Court of Indiana

JURISDICTIONAL STATEMENT

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Appellant appeals from the judgment of the Indiana Supreme Court, entered on March 24, 1975, affirming the trial court's judgment which denied appellant's efforts to get his police pension reinstated. Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Indiana Supreme Court is reported in 324 N.E. 2d 813. The opinion of that court is attached hereto as Appendix A.

This case came to that court under the peculiar Indiana "transfer" procedure, the trial court's judgment having been first reversed by the Indiana Court of Appeals. That opinion is reported in 313 N.E. 2d 351 and is attached hereto as Appendix B. (Neither opinion is, as yet, printed in the official Indiana reporters.)

JURISDICTION

This suit was brought to restore the appellant's police pension, after it had been terminated because of his felony conviction. The judgment of the Indiana Supreme Court was entered on March 24, 1975, and notice of appeal was filed in that court on June 9, 1975. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1257(2) and 2101(c). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment:

Dent v. Virginia, 129 U.S. 114 (1889);

Ex Parte Garland, 71 U.S. (4 Wall.) 333 (1867);

Cummins v. Missouri, 71 U.S. (4 Wall.) 277 (1867).

STATUTE INVOLVED

Appellant challenges the validity of the Acts of the Indiana General Assembly of 1925, Chapter 51, §5, p. 167, codified as IC 1971, 19-1-24-5 (Ind. Ann. Stat. §48-6405) Its verbatim text follows:

"Forfeiture of pension.—Whenever any person who shall have received any benefit from such fund shall be convicted of a felony or shall become an habitual drunkard or shall fail to report himself for duty or for examination, or otherwise shall fail to comply with any legal requirements imposed by the board of trustees of the police pension fund, said board may upon notice to any such person discontinue or reduce in its discretion any payments that might otherwise accrue thereafter: Provided, however, That nothing contained in this act [19-1-24-1—19-1-24-6] shall be construed to entitle said board to recall into service any member who has previously been retired from active service on account of having served twenty [20] years or more; nor shall anything in this act be construed to entitle a retired member to a pension after he shall have been convicted of a felony, or shall have become an habitual drunkard."

QUESTION PRESENTED

1. Does a state statute which legislatively forfeits a pension of a convicted felon, violate the Federal Constitutional prohibition against bills of attainder?

STATEMENT

On March 8, 1972, the appellant filed a complaint against appellee for the restoration of his police pension benefits, in the Vanderburgh Superior Court of Vanderburgh County, Indiana. He alleged that he had been a policeman on the police department of the City of Evansville, Indiana, became disabled and began to draw his pension. The appellee filed an answer denying the allegations of this complaint. On the trial, the facts were stipulated:

"1. The plaintiff, Wilbert Lee Ballard, was, prior to his retirement as set out hereinafter, a member of the Police Department of the City of Evansville, Indiana.

2. That the defendant, Board of Trustees of the Police Pension Fund of the City of Evansville, Indiana, is the legal entity charged with the ownership, trusteeship, and maintenance of the Police Pension Fund of the Police Department of the City of Evansville, Indiana.

3. That the plaintiff, Wilbert Lee Ballard, was permanently injured in an on-duty accident when serving with the Evansville Police Department, and, thereafter, in November of 1967, was retired from said department on a disability pension, administered by the Board of Trustees of the Pension Fund of the City of Evansville, Indiana.

4. That, thereafter, the said Wilbert Lee Ballard regularly drew said pension until the same was terminated and cancelled as set out hereinafter.

5. That on the 14th day of August, 1970, the said Wilbert Lee Ballard was convicted of second degree murder in the Superior Court for Pima County, Tucson, Arizona. That second degree murder is, and was at said time, a felony according to the laws of the State of Arizona.

6. That, thereafter, on August 16, 1970, the defendant Board of Trustees discontinued paying to the said Wilbert Lee Ballard his pension benefits solely because of said conviction."

These additional facts were established by a request for admission:

"That at the time the plaintiff's pension, referred to in plaintiff's complaint, which he was being paid by the defendant herein, was discontinued and cancelled, until

August 14, 1971, the said Wilbert Lee Ballard had three dependent children, and that on said latter date one of said children was married, leaving Wilbert Lee Ballard with two dependent children which he still has at this time."

The trial court entered judgment against the appellant.

The appellant then filed a motion to correct errors which raised the federal question. He pointed out that the challenged statute was unconstitutional and void, violating the Federal Constitutional prohibition against bills of attainder, *inter alia*. (Record of the Proceedings, pp. 1-2)

His motion to correct errors was overruled and he prosecuted an appeal to the Court of Appeals of Indiana. In his brief in that Court he again presented the federal question. He cited the Constitution of the United States, Article 1, § 10 [1]. (Appellant's Brief, p. 11) He cited the case of *United States v. Brown*, 381 U.S. 437. (Appellant's Brief, pp. 18-23)

The Court of Appeals of Indiana ruled for the appellant, reversing the trial court's judgment.

The appellee petitioned the Supreme Court of Indiana to review, or transfer, the judgment and opinion of the Court of Appeals. In his brief in opposition to the petition to transfer, the appellant again cited the Constitution of the United States, Article 1, § 10 [1] (pp. 1-2), and *United States v. Brown*, 381 U.S. 437 (pp. 8-10). The Supreme Court of Indiana did transfer the case, reversing the Court of Appeals and reinstating the trial court's judgment.

Appellant filed a notice of appeal to this court in the Supreme Court of Indiana on the 9th day of June, 1975, a copy of which is attached hereto as Appendix C.

THE QUESTIONS ARE SUBSTANTIAL

"A bill of attainder is a legislative act which inflicts punishment without a judicial trial." *Cummins v. Missouri*, 71 U.S. (4 Wall.) 277 (1867). Historically, bills of attainder were acts of parliament whereby the death sentence was imposed. Bills of pains and penalties were acts which called for any punishment less than death. The Constitution of the United States, Article 1, § 10 [1] has been held to encompass both bills of attainder and bills of pains and penalties. *Cummins v. Missouri, supra.*

Before a given legislative act can be held invalid as a bill of attainder, three definitional elements must be present—specificity in identification, punishment, and lack of judicial trial. *United States v. O'Brien*, 391 U.S. 367 (1968). The appellant respectfully contends that I.C. 1971 19-1-24-5 (Ind. Ann. Stat. § 48-6405) contains these three necessary elements and is therefore an unconstitutional bill of attainder.

The Indiana Supreme Court held that the appellant had no vested interest in, or contractual right to, the payments under the police pension. Assuming, *arguendo*, that this is a correct assessment of the nature of appellant's interest, a state may not terminate that interest by way of a bill of attainder. Appellant's interest in the pension, while not being vested or arising as a contractual right, is substantial enough to be afforded Constitution protection. See *Flemming v. Nestor*, 363 U.S. 603 (1960).

It is not necessary that the statute specifically set forth the names of those individuals to whom punishment is forthcoming. All that is required is that the statute establish an easily ascertainable class. *Cummins v. Missouri*, 71 U.S. (4 Wall.) 277 (1867); *United States v. Brown*, 381 U.S. 437 (1965). The Indiana act provides for the termination of pensions payable to those individuals who have been convicted of a felony

or who have become habitual drunkards. At least in the case of those persons convicted of a felony, membership in the designated class is easily ascertainable.

What constitutes punishment within the meaning of the Constitutional provision has been a more difficult and uncertain question. Depending on the circumstances surrounding the statute's passage and enforcement, and the deprivation which results, the termination of any right, previously enjoyed, may be punishment. *Cummins v. Missouri, supra.*

This Court has established several tests, all based in the end on identical considerations, but phrased so as to reflect the circumstances of the case. In *Cummins v. Missouri*, 71 U.S. (4 Wall.) 277 (1867); *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1867); and *Dent v. Virginia*, 129 U.S. 114 (1889), the inquiry was directed toward determining whether the particular statute was intended to reach the man or the calling.

In *DeVeau v. Braisted*, 363 U.S. 144 (1960), the consideration of the Court was whether the legislative aim was to punish the individual for his past actions, or whether the restriction came about as a relevant incident to the regulation of a proper area of legislative control.

In *Flemming v. Nestor*, 363 U.S. 603 (1960), the Court's test was whether termination of benefits under the statute was based on the grounds for rather than the fact of the appellant's deportation.

In the decisions in this area, the Court has had to determine in the end the underlying purpose of the particular statute. If the aim of Congress or the state legislature was to punish an individual, to deprive him of some previously enjoyed right as a result of his past conduct, then the act has been held to be an unconstitutional bill of attainder. If its

aim was to regulate some activity and thus accomplish a legitimate governmental purpose, the statute has been upheld as a valid exercise of legislative power.

On its face, the Indiana statute is a regulation of pension payments. However, form will not control the determination of whether or not the statute is penal in nature. *Trop v. Dulles*, 356 U.S. 86 (1958). The effect of I.C. (1971) 19-1-24-5 (Ind. Ann. Stat. § 48-6405) is to deprive the appellant of future pension payments as a result of his past conduct.

The Indiana Supreme Court stated that the intent of the Indiana legislature may have been to deter criminal acts on the part of those who may be recalled to active police service, or to uphold the morale of the general public or the active police forces in the State.

If the intent of the legislature was to deter others from similar acts, then the statute is penal in nature. *Trop v. Dulles, supra.* And even though there may exist some connection, though arguably tenuous, between the termination of pension payments to convicted felons and public or police morale, this will not evince a regulatory purpose in the statute when its substance and effect is decidedly penal. *Trop v. Dulles, supra.*

The substance and purpose of the statute is to deny pension payments to those retired or disabled members of a police force who commit acts which, in the eyes of the legislature, are especially blameworthy on the part of an ex-policeman or woman. No valid or substantial regulatory purpose is served by such a provision.

The appellant is aware of this Court's decision in *Flemming v. Nestor*, 363 U.S. 603 (1960), in which it was held that a federal statute which terminated social security payments due an alien who had been deported was not penal in nature and was therefore not a bill of attainder. Such a provision does have substantial regulatory purposes, e. g. confinement of the

economic impact of social security, or regulation of the residence of its recipients. The Indiana statute in question cannot be justified in this manner.

Finally, punishment in the form of termination of pension payments was inflicted upon the appellant without judicial trial. I.C. 1971 19-1-24-5 does not only provide for termination without any sort of administrative hearing, but makes such termination mandatory as well. Any attempt by the appellant to plead his case before the board of trustees would have been futile.

Undoubtedly, there must be a public reaction to paying a pension to one who breaks the laws he at one time enforced. Examined in its context, payment of such pension is not such a wracking anomoly which should bend the Constitution. The record in the case at bar demonstrates that appellant has dependents. This Court judicially knows that convicts do not have an opportunity to spend much money; thus, the revocation of the pension effectively punishes the convict's family. This is a medieval concept which has no place in twentieth century American jurisprudence.

The appellant, having once been punished for acts deemed a felony, must now, under the Indiana statute, suffer additional loss of previously enjoyed benefits because of the legislature's disapproval of such acts on the part of a police pensioner. The appellant respectfully submits that such a statute is a constitutionally forbidden bill of attainder. Appellant also believes that the questions presented by this appeal are substantial and that they are of public importance.

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APPENDIX

APPENDIX A

Opinion and Judgment of the Indiana Supreme Court

(Filed March 24, 1975, Billie R. McCullough,

Clerk of the Indiana Supreme and Court of Appeals)

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In the Supreme Court of Indiana

Wilbert Lee Ballard,
Appellant,
v.
Board of Trustees of the Police Pension Fund of the City of Evansville, Indiana,
Appellee.
No. 375 S-72.

Appeal From Vanderburgh Superior Court.

The Honorable Terry D. Dietsch, Presiding Judge.

On Petition to Transfer

Arterburn, J.

We grant transfer in this case to consider whether or not that provision of the Police Pension Fund Act which permits the

Board of Trustees of the Fund to discontinue the pension payments of a person convicted of a felony violates Art. 1, § 30 of the Indiana *Constitution* which reads: "No conviction shall work corruption of blood, or forfeiture of estate."

Plaintiff-appellant Ballard brougnt an action for restoration of his policeman's disability pension which had been terminated by defendant-appellee Board subsequent to Plaintiff's conviction of a felony. The trial court ruled in favor of the appellee and Ballard appealed. The Court of Appeals, First District, found the statutory provision unconstitutional and directed the trial court to restore Ballard's pension, including benefits accumulated since termination. The Board petitioned for transfer.

The parties stipulated the following facts:

> "1. The plaintiff, Wilbert Lee Ballard, was, prior to his retirement as set out hereinafter, a member of the Police Department of the City of Evansville, Indiana.
>
> 2. That the defendant, Board of Trustees of the Police Pension Fund of the City of Evansville, Indiana, is the legal entity charged with the ownership, trusteeship, and maintenance of the Police Pension Fund of the Police Department of the City of Evansville, Indiana.
>
> 3. That the plaintiff, Wilbert Lee Ballard, was permanently injured in an on-duty accident when serving with the Evansville Police Department, and, thereafter, in November of 1967, was retired from said department on a disability pension, administered by the Board of Trustees of the Pension Fund of the City of Evansville, Indiana.
>
> 4. That, thereafter, the said Wilbert Lee Ballard regularly drew said pension until the same was terminated and cancelled as set out hereinafter.
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> 5. That on the 14th day of August, 1970, the said Wilbert Lee Ballard was convicted of second degree murder

> in the Superior Court for Pima County, Tucson, Arizona. That second degree murder is, and was at said time, a felony according to the laws of the State of Arizona.
>
> 6. That, thereafter, on August 16, 1970, the defendant Board of Trustees discontinued paying to the said Wilbert Lee Ballard his pension benefits solely because of said conviction."

Ballard v. Bd. of Trustees of Police Pension Fund of City of Evansville (1974), — Ind. —, 313 N.E.2d 351 at 353.

The section of the Act which authorized the termination of pension benefits reads as follows:

> "Whenever any person who shall have received any benefit from such fund shall be convicted of a felony or shall become an habitual drunkard or shall fail to report himself for duty or for examination, or otherwise shall fail to comply with any legal requirements imposed by the board of trustees of the police pension fund, said board may upon notice to any such person discontinue or reduce in its discretion any payments that might otherwise accrue thereafter: Provided however, that nothing contained in this act [§§ 48-6401-48-6406] shall be construed to entitle said board to recall into service any member who has previously been retired from active service on account of having served twenty [20] years or more; nor shall anything in this act be construed to entitle a retired member to a pension after he shall have been convicted of a felony, or shall have become an habitual drunkard [Acts 1925, ch. 51, § 5, p. 167.]"

IC 1971, 19-1-24-5 [*Burns' Ind. Stat. Ann.* § 48-6405 (1974 Supp.)].

The pension fund comes from several sources, including gifts, proceeds from the sale of recovered property, penalties for vio-

lation of police rules, and "deductions" from salaries. A person choosing employment as a police officer is automatically under the pension fund provisions. IC 1971, 19-1-24-2 [*Burns' Ind. Stat. Ann.* § 48-6402 (1974 Supp.)] The Court of Appeals correctly held that in Indiana pensions under a state compulsory contribution plan like the Police Pension Fund have traditionally been considered gratuities from the sovereign involving no agreement of the parties and, therefore, creating no contractual rights. *Kern v. State ex rel. Bess* (1937), 212 Ind. 611, 10 N.E. 2d 915; *Klamm v. State ex rel. Carlson* (1955), 235 Ind. 289, 126 N.E.2d 487. The involuntary plans are gratuities from the sovereign as distinguished from voluntary or optional pension plans, normally called "annuities," where there is an agreement that a deduction shall be made out of the salary of the employee. *Jensen v. Pritchard* (1950), 120 Ind. App. 439, 90 N.E.2d 518. In a voluntary system the employee theoretically may keep his money or pay it back to the fund, while under the involuntary system the money, although denominated compensation, is never owned or controlled by the employee but retained by the state and is, therefore, in practical effect a contribution by the state. Under this theoretical distinction there is no vested right in the money residing in an involuntary or compulsory pension system. *Kern, supra; Klamm, supra.*

Nevertheless, the Court of Appeals relied on language from *Klamm, supra*, and held that in the instant case a vested interest existed. The passage from *Klamm, supra,* is as follows:

> "Where the statutory conditions for retirement existing when the application is made have been met, and the award of the pension has been made, or as of right should have been made, the pensioner's interest becomes vested and takes on the attributes of a contract, *which, in the absence of statutory reservations,* may not legally be diminished or otherwise adversely affected by subsequent legislation. Pennie v. Reis, 1889, 132 U.S. 464, 10 S. Ct. 149, 33 L. Ed. 426, supra; Freyermuth v. State ex rel. Pinter, 1939, 215 Ind. 693, 21 N.E.2d 707; Roddy v. Valentine, 1935, 268 N.Y. 228, 197 N.E. 260, supra; Klench v. Board of Pension Fund Commrs. 1926, 79 Cal. App. 171, 249 P. 46; State ex rel. v. Trustees, 1948, 149 Ohio St. 477, 79 N.E. 2d 316; Id., 150 Ohio St. 377, 82 N.E. 2d 743." (our emphasis)

Klamm, supra, 235 Ind. at 292-293. We disagree with the interpretation which the Court of Appeals has given the *Klamm* case.

I

Considering the actual language used in *Klamm*, we see that the Court said that the pensioner's interest becomes "vested" *only* "in the absence of statutory reservations" and for the purpose of being "adversely affected by subsequent legislation." *Klamm*, supra, 235 Ind. at 292. In the instant case there were several statutory reservations, one of which was that Appellant not become convicted of a felony. Appellant's interest was subject to and conditioned by the terms of the legislation which created his interest at the time he took or received it in the first place.

The Appellant at the time of employment took the employment subject to statutory terms and conditions. He could have refused the proffered employment. We are involved here with a matter of legislative policy. The legislature could have made such a pension plan conditional upon a number of factors and events; such as, age, marital status of named beneficiary, future income and employment, to mention only a few such factors. It could be argued all such terms or conditions provide for forfeiture. Here the legislature saw fit to provide for the termination of the pension fund payments upon the occurrence of certain events. Under the terms of the statute in question a

policeman on disability pension may be recalled to perform certain duties. IC 1971, 19-1-24-2 [*Burns' Ind. Stat. Ann.* § 48-6404 (1974 Supp.)]. Reasonable legislative policy here provided for a method of deterring criminal acts on the part of those who might be recalled into police service. Furthermore, the legislature could have thought that payment of a pension to a felon would undermine the morale of both the general public and the active police forces of the state. It seems to us that the policeman, a public employee, took the employment subject to the conditions which the legislature saw fit to impose for reasons of public policy. Statutes are clothed with a presumption of constitutionality. *Martin v. Ben Davis Conservancy Dist.* (1958), 238 Ind. 502, 153 N.E.2d 125; *Center v. Commercial Bank of Crown Point* (1936), 209 Ind. 510, 199 N.E. 567; *Carr v. State* (1911), 175 Ind. 241, 93 N.E. 1071. It does not behoove the judiciary to tell the legislature its policies are wrong.

Even if they were to adopt the contractual theory, it seems to us that what Appellant had upon his qualification for the pension was not an absolute right but a conditional or contingent right. In the language of real property, he had a vested right subject to divestment upon a *condition subsequent*. Upon his conviction for a felony, his right to future pension payments became divested.

Even if we assume that the pensioner had some financial interest, it was a right or interest subject to conditions. The right was not total or absolute, but limited. Therefore, the argument that a "forfeiture of estate" occurred is not valid since the estate or right of the pensioner was from the beginning limited. Appellant's "estate" consisted of only those pension payments due him so long as he was not a convicted felon. We might have a different question if this pension plan had been amended, after the Appellant had become a member, to provide that he could lose his pension upon conviction for a felony. We do not have that question, and we do not answer that question at this time.

II

In addition, we believe that the termination of pension benefits by the Board of Trustees of the Police Pension Fund did not work a "forfeiture of estate" on Appellant within the constitutional meaning of that phrase. In the first place, the conviction, strictly speaking, did not provide for the forfeiture. The statute provides that the Board may in its discretion terminate or reduce pension payments to a policeman convicted of a felony. The Board could have reduced the amount of the payments or left the payment intact. IC 1971, 19-1-24-5 [*Burns' Ind. Stat. Ann.* § 48-6405 (1974 Supp.)]. We think that Art. 1, § 30 of the *Constitution* prohibits the *automatic* forfeiture to the State of property upon conviction. Secondly, there is a real question as to whether or not a termination of pension payments is even a "forfeiture." "Forfeiture of estate" clauses were placed in some of the state constitutions. 16 Am. Jur.2d *Const. Law* § 411 (1964); 10 ALR 1591 (1921). They were a response to the common law practice of attainder. After sentence, the offender, by operation of law, was placed in a state of attainder. 1 Chit. *Crim. Law* 723 (1841). "The consequences of attainder are forfeiture and corruption of blood." 4 Wendell's Blackstone's *Commentaries* 380 (1852). Forfeiture was a part of the punishment of the crime whereby the goods and chattels, lands and tenements (estate) of the attainted felon were forfeited to the king; the personalty absolutely on conviction and the realty on sentence being pronounced. The attainted person was not divested of his lands automatically on conviction, but it required a subsequent proceeding. *Avery v. Everett* (1888), 110 N.Y. 317, 18 N.E. 140 (N.Y. Ct. of Appeals). Thus, an attainted person could devise or demise his lands subject only to the King's right of entry. In other words, an attainted person held title good as to all except the sovereign. *Avery, supra.* Forfeiture was, then, like the even more ancient practice of deodand, a source of revenue for the king. "Almost all criminal justice was gradually being claimed for the king; such justice was a profitable

source of revenue, of forfeitures, fines and amendments." F. Maitland, *The Forms of Action at Ancient Common Law* 12 (1936).

So, at common law forfeiture was understood to be the transfer of title of a specific res from the owner of the sovereign power. *Commonwealth v. Avery* (1879), 11 Ky. 625, 29 A.R. 429. Thus, it seems that a fine as a penalty for a criminal conviction is not a "forfeiture of estate" since a fine is a fungible thing. The term "estate" ordinarily means the whole of the property owned, the realty as well as the personalty. Black's *Law Dictionary*, 4th Ed. (1951). And this was what was lost by common-law forfeiture—the whole estate; whereas a fine, like a pension payment, being merely one fungible and predetermined amount is not an "estate" of the convicted felon in its historical sense.

For all of the foregoing reasons, we find that the Police Pension Act does not violate our constitutional provision against forfeiture of estate. We grant transfer, vacate the opinion and judgment of the Court of Appeals, and reinstate the judgment of the trial court.

All Justices Concur.

APPENDIX B

Opinion and Judgment of the Indiana Court of Appeals

(Filed June 25, 1974, Billie R. McCullough, Clerk of the Indiana Supreme and Court of Appeals)

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In the
Court of Appeals of Indiana
First District

Wilbert Lee Ballard,
Plaintiff-Appellant,
v.

Board of Trustees of the Police Pension Fund of the City of Evansville, Indiana,
Defendant-Appellee.

No. 1-873-A-139.

Appeal from the Vanderburgh Superior Court
The Honorable Terry D. Dietsch, Judge

Lybrook, J.

Plaintiff-appellant Ballard brought an action for restoration of his policeman's pension which had been terminated by

defendant-appellee Board due to his conviction of a felony. From a judgment in favor of the appellee, Ballard appeals.

Ballard challenges the constitutionality of the termination of his benefits pursuant to IC 1971, 19-1-24-5, Ind. Ann. Stat. § 48-6405 (Burns 1963), which provides:

> "Whenever any person who shall have received any benefit from such fund shall be convicted of a felony or shall become an habitual drunkard or shall fail to report himself for duty or for examination, or otherwise shall fail to comply with any legal requirements imposed by the board of trustees of the police pension fund, said board may upon notice to any such person discontinue or reduce in its discretion any payments that might otherwise accrue thereafter: Provided, however, That nothing contained in this act [§§ 48-6401-48-6406] shall be construed to entitle said board to recall into service any member who has previously been retired from active service on account of having served twenty [20] years or more; nor shall anything in this act be construed to entitle a retired member to a pension after he shall have been convicted of a felony, or shall have become an habitual drunkard. [Acts 1925, ch. 51, § 5, p. 167.]"

The issue was presented to the court upon the following stipulation of fact by the parties:

> "Come now the parties by counsel and stipulate and agree that the following facts are true and that this stipulation may be used upon the trial of this cause, both parties, however, reserving the right to introduce other evidence, said stipulation being as follows, to-wit:
>
> 1. The plaintiff, Wilbert Lee Ballard, was, prior to his retirement as set out hereinafter, a member of the Police Department of the City of Evansville, Indiana.

> 2. That the defendant, Board of Trustees of the Police Pension Fund of the City of Evansville, Indiana, is the legal entity charged with the ownership, trusteeship, and maintenance of the Police Pension Fund of the Police Department of the City of Evansville, Indiana.
>
> 3. That the plaintiff, Wilbert Lee Ballard, was permanently injured in an on-duty accident when serving with the Evansville Police Department, and, thereafter, in November of 1967, was retired from said department on a disability pension, administered by the Board of Trustees of the Pension Fund of the City of Evansville, Indiana.
>
> 4. That, thereafter, the said Wilbert Lee Ballard regularly drew said pension until the same was terminated and cancelled as set out hereinafter.
>
> 5. That on the 14th day of August, 1970, the said Wilbert Lee Ballard was convicted of second degree murder in the Superior Court for Pima County, Tuscon, Arizona. That second degree murder is, and was at said time, a felony according to the laws of the State of Arizona.
>
> 6. That, thereafter, on August 16, 1970, the defendant Board of Trustees discontinued paying to the said Wilbert Lee Ballard his pension benefits solely because of said conviction.
>
> 7. That at the time said pension was discontinued and cancelled, the said Wilbert Lee Ballard was drawing the sum of $322.50 per month in pension benefits from the defendant, and said pension was payble [sic] at said rate per month until the year of 1971 when it would have been increased to the sum of $343.64 per month, at which rate it was payable until the year of 1972 at which time it would have been increased to the sum of $353.74 per month."

I

Resolution of the issues presented in this cause necessitates an examination of the nature of the rights, if any, which an officer acquires through participation in the Police Pension Fund.[1]

The fund is derived from several sources, including contributions by police officers during the course of their employment. It is the character of these contributions by the members of the force which is of controlling significance for purposes of this appeal, since courts have traditionally drawn a distinction between voluntary and involuntary plans.

Participation in the pension plan with which we are concerned is clearly involuntary. Every member of the police force is liable to the payment of assessments into the fund and is conclusively deemed to have agreed that enforced contributions may be deducted from his salary. IC 1971, 19-1-24-2, Ind. Ann. Stat. § 48-6402 (Burns 1973 Cum. Supp.).

According to the great weight of authority and the law of this State, involuntary plans are mere gratuities involving no agreement of the parties. The pension has been characterized as a bounty springing from the appreciation and graciousness of the sovereign. Accordingly, it may be given, withheld, distributed or recalled at the sovereign's pleasure. While the contributions made by the employee are commonly designated as compensation, he neither receives nor controls them. Since the individual cannot prevent appropriation of his contributions to the fund, he lacks the power of disposition which accompanies ownership of property. Since he completely lacks control over or right to the monies appropriated, it has been theorized that the payments into the fund are not in fact personal contribu-

[1] IC 1971, 19-1-24-1—19-1-18-26, Ind. Ann. Stat. §§ 48-6401—48-6455 (Burns 1963, 1973 Cum. Supp.).

tions. Herein lies the distinguishing factor between voluntary and involuntary contributions systems. Under a voluntary plan the employee theoretically receives the money then turns it back to the fund. In effect, the money becomes private means and is then contributed. Conversely, under an involuntary plan it is considered that the monies are never actually segregated from public funds. The end result is that no vested rights are acquired in the fund by the employee under an involuntary plan. *Kern v. State ex rel. Bess* (1937), 212 Ind. 611, 10 N.E. 2d 915, citing *Pennie v. Reis* (1889), 132 U.S. 464, 10 S. Ct. 149; *Jensen v. Pritchard* (1950), 120 Ind. App. 439, 90 N.E. 2d 518, citing *Raines v. Board of Trustees Pen. Fund* (1937), 365 Ill. 610, 7 N.E. 2d 489.

In *Klamm v. State ex rel. Carlson* (1955), 235 Ind. 289, 126 N.E. 2d 487, our Supreme Court reiterated the concepts that pensions under an enforced or compulsory contribution plan are gratuities, involving no agreement of the parties and creating no vested rights. However, the court went on to say:

> "Where the statutory conditions for retirement existing when the application is made have been met, and the award of the pension has been made, or as of right should have been made, the pensioner's interest becomes vested and takes on the attributes of a contract, which, in the absence of statutory reservations, may not legally be diminished or otherwise adversely affected by subsequent legislation. Pennie v. Reis, 1889, 132 U.S. 464, 10 S.Ct. 149, 33 L.Ed. 426, supra; Freyermuth v. State ex rel. Pinter, 1939, 215 Ind. 693, 21 N.E. 2d 707; Roddy v. Valentine, 1935, 268 N.Y. 228, 197 N.E. 260, supra; Klench v. Board of Pension Fund Commrs., 1926, 79 Cal. App. 171, 249 P. 46; State ex rel. v. Trustees, 1948, 149 Ohio St. 477, 79 N.E. 2d 316; Id., 150 Ohio St. 377, 82 N.E. 2d 743."

Upon the above authority Ballard argues that upon retirement he acquired a vested contractual right to the payment

of his pension. Appellee, on the other hand, insists that the pensioner's right is merely statutory, rather than contractual in nature.

The language employed being somewhat less than definite, we have examined the cases cited by the *Klamm* court as authority for the above statement. *State ex rel. v. Trustees, supra,* involved constructions by the Ohio Supreme Court of certain legislative amendments to the state pension plans for firemen and policemen. The statutes generally provided that the granting of a pension to an eligible beneficiary would operate to vest a right in that person to receive such pension at the ra fixed at the time of the granting for so long as he remains a beneficiary.

In considering the nature of the right acquired by the pensioner, the court reasoned:

> "Doubtless the considerations outlined just above were responsible, in a measure at least, for the enactment of the 'vested right' statutes, and the effect of those statutes is to make the engagement of public authorities to pay a pension, upon conditions fulfilled, a contractual obligation founded upon a valid consideration, giving to the pensioner a vested right in his pension which cannot afterwards be impaired or revoked.
>
> The cases of Retirement Board of Allegheny County v. McGovern et al. Com'rs, 316 Pa. 161, 169, 174 A. 400, 404, and David v. Veitscher Magnesitwerke Actien Gesellschaft, 348 Pa. 335, 346, 35 A.2d 346, 351, are authority for the proposition that, 'until an employee has earned his retirement pay, or until the time arrives when he may retire, his retirement pay is but an inchoate right; *but when the conditions are satisfied, at that time retirement pay becomes a vested right of which the person entitled thereto cannot be deprived; it has ripened into a full contractual obligation.*'" (Emphasis supplied.)

On the basis of *Klamm, supra,* and the above cited authority, we must conclude that upon retirement Ballard acquired a vested contractual right to the payment of his pension. It is in this context that we must consider the purported authority to terminate his pension benefits pursuant to Burns § 48-6405, *supra.*

II

Appellant argues that termination of his pension was violative of Art. 1, § 30 of the Indiana Constitution, which provides:

> "No conviction shall work corruption of blood, or forfeiture of estate."

In support of his argument, Ballard relies heavily on *Leonard v. City of Seattle* (1972), 81 Wash. 2d 479, 503 P. 2d 741, wherein a retired police officer successfully challenged the discontinuance of his pension following a felony conviction. The Washington Supreme Court concluded that as applied in the officer's circumstances, a statutory provision strikingly similar to Burns § 48-6405[2] had operated to work a forfeiture of his estate in derogation of the State Constitution.[3]

The thrust of the court's reasoning appears in the following excerpts from the text of the opinion:

> "We accept the city's contention to the extent that the retirement pension is contractual in nature; but that does

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[2] Rev. Code Wash. Ann. 41.—20.110.

[3] Wash. Const. Art. 1, § 15.

not mean that once vested the right to the pension does not constitute a part of the recipient's estate. That the retirement pension arises out of a contract of employment does not deprive it of the characteristics of property, but rather imparts to it that very characteristic by removing it from the status of a gratuity, mere expectancy, or simply a promise enforceable ultimately by no more than a judgment for damages.

* * * * * * *

". . . As fully ripened, plaintiff's pension constituted property—the present right to payment of his deferred compensation. When his rights to the pension fully vested, he acquired enforceable rights to funds under the control of the trustees according to his contract, and these rights thus finally vested constituted property not to be divested or defeated by means or for other reasons or on different grounds than those upon which any other kind of property could be alienated or defeated.

* * * * * * *

"We must, therefore, conclude that plaintiff's right to a pension vested completely on his retirement; that, although these rights had developed in a continuing process of vesting through a continuing contract of employment in the public service and were contractual in nature, they completely vested upon his retirement; that, having fully vested upon retirement, they constituted valuable property of his estate; and that to take this property away from him as a consequence of his conviction of a felony after fully vesting would unconstitutionally work a forfeiture of estate prohibited by Const. Art. 1, § 15, for conviction of a crime."

Concededly, the Washington decisions reflect a theoretical approach to the concept of pension rights which differs somewhat from that employed by the courts of this State. In that

State, pension rights begin to vest upon the commencement of employment or service and continue to vest under the then applicable legislation until retirement requirements are met. *Leonard, supra*, citing *Bowen v. Statewide City Employees Retirement System* (1967), 72 Wash. 2d 397, 433 P. 2d 150.

Such an approach conflicts with the general rule in this State that an employee acquires no vested rights in the pension fund during the period of his employment. *Kern v. State ex rel. Bess, supra; Jensen v. Pritchard, supra; Klamm v. State ex rel. Carlson, supra.* As we have demonstrated, however, it is clear from *Klamm* and the authority upon which it relies that once the statutory conditions for retirement have been satisfied, the retiree acquires a vested contractual right to the payment of his pension. From that point in time, the Indiana pensioner would not appear to stand in a position any different from that of his Washington counterpart.

Appellee Board directs our attention to *Salley v. Firemen's and Policemen's Pension Fund Commission* (1940), 124 N.J.L. 79, 11 A. 2d 244. In that case, a retired police officer receiving pension payments was convicted of a felony and sentenced to a prison term. During his incarceration, the New Jersey legislature enacted a statute providing for the suspension of pension payments during confinement in a penal institution as a result of conviction of a crime involving moral turpitude. The State Supreme Court affirmed a denial of recovery by the officer's assignee of the pension payments withheld.

Salley, however, is inapplicable to the case at bar since the court specifically declined to find any contractual or vested right between the government and the pensioner.

In our opinion, *Leonard v. City of Seattle, supra*, provides appropriate guidance in the resolution of the issue with which we are confronted. Upon his retirement from the police force and

the award of his pension, appellant Ballard clearly acquired a vested contractual right to the payment of his pension. It would appear an inescapable conclusion that this right possesses the characteristics of property, and, as such constitutes a part of his estate.

It cannot be doubted that this vested right may be subject to various valid statutory reservations. However, we are constrained to hold that the termination of Ballard's pension payments through application of the particular statutory reservation found in Burns § 48-6405 has worked for forfeiture of his estate in violation of Art. 1, § 30 of the Indiana Constitution.

We reach this result fully cognizant of and in sympathy with the State's interest in assuring that those who are charged with the enforcement of our laws continue to exemply that standard of moral character which commands the respect of those persons whom they serve. It is, however, a principle basic to our system of justice that a man may not be deprived of his estate and, hence, his heirs deprived of their inheritance, by reason of a criminal conviction. Our Constitution permits no lesser standard of protection for a public servant than for any other individual.

Having reached this conclusion, it is not necessary that we consider any other contention of error presented by appellant in this appeal.

Cause reversed and remanded with instructions to the trial court to enter judgment for plaintiff restoring his pension and granting those benefits accumulated since the termination thereof.

Robertson, P. J. and Lowdermilk, J. Concur

APPENDIX C

In the
Supreme Court of Indiana

Wilbert Lee Ballard,
Appellant,
vs.
Board of Trustees of the Police Pension Fund of the City of Evansville, Indiana,
Appellee.
} No. 375 S 72.

Notice of Appeal to the Supreme Court of the United States

Notice is hereby given that Wilbert Lee Ballard, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Indiana, affirming the trial Court's judgment against Appellant in his claim for restoration of his police pension, which order of the Supreme Court was entered herein on the 24th day of March, 1975.

This appeal is taken pursuant to 28 U.S.C. § 1257 (2) and 2101 (c).

/s/ JOHN D. CLOUSE
1004 Hulman Building
Evansville, Indiana 47708
Telephone: (812) 424-6671
Counsel for Appellant

PROOF OF SERVICE

State of Indiana
County of Vanderburgh } ss.

John D. Clouse respectfully shows to the Court:

1. That he is counsel for Appellant in the above-entitled cause.

2. That on the 9th day of June, 1975, he served a copy of the above Notice of Appeal to the Supreme Court of the United States, in the above-entitled cause, by depositing the same in the United States mail, charges prepaid, first class, properly addressed to John C. Cox, Attorney for Appellee, 16 N. W. Sixth Street, Evansville, Indiana 47708.

/s/ JOHN D. CLOUSE
Counsel for Appellant

John D. Clouse, being first duly sworn, upon his oath says that the statements contained in the foregoing proof of service are true.

/s/ JOHN D. CLOUSE

Subscribed and sworn to before me, a Notary Public in and for said County and State, this 9th day of June, 1975.

/s/ BARBARA C. ADCOCK
Notary Public

My Commission expires: June 4, 1979.

(Seal)